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No. _____
October 1999 Term

IN THE
SUPREME COURT OF THE UNITED STATES

Patricia Manson — *Petitioner*
vs.
Little Rock Newspapers, Inc. — *Respondent*
d/b/a Arkansas Democrat-Gazette

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The *Arkansas Democrat-Gazette* fired reporter Patricia Manson two and a half months after she turned 40. Noting she was "barely 40," the district court granted summary judgment in favor of the newspaper. Did Congress intend for the Age Discrimination in Employment Act to place a heavier burden on 40-year-old employees by requiring them to submit to a higher quantum of evidence than employees who are in the late 40s, 50s or 60s?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 200 F.3d. 1172 (8th Cir. 2000). A copy of the opinion is included in the appendix in Appendix E at App. 47-50.

The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, is reported at 42 F.Supp.2d. 856 (E.D. Ark. 1999). A copy of the opinion is included in the appendix in Appendix C at App. 16-46. The separate order dismissing the action on March 9, 1999, is printed in the appendix in Appendix D at App. 46-47.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on January 26, 2000. On February 7, 2000, petitioner filed a petition for rehearing that the United States Court of Appeals for the Eighth Circuit denied on March 15, 2000. Appendix F at App. 50. On May 15, 2000, the petitioner Patricia Manson filed a motion for extension of time. The motion was presented to Justice Thomas, who on May 23, 2000, extended the time to file a petition for a writ of certiorari to and including July 13, 2000. Appendix G in App. 51-52. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.

STATEMENT OF THE CASE

Ms. Patricia Manson ("Manson") was a reporter for the Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette ("Arkansas Democrat-Gazette" or "newspaper") from September 1993 to December 26, 1996. When the newspaper fired Ms. Manson on December 26, 1996, she was the newspaper's federal court news correspondent. Ms. Manson had turned 40 on October 9, 1996. Ms. Manson filed an age and sexual discrimination charge against the newspaper on March 13, 1997.

The United States District Court, the Honorable H. Franklin Waters, granted the newspaper's motion for summary judgment. The district court started and ended its opinion by noting Ms. Manson was "barely" 40 years old. App. 17, App. 45 and 42 F.Supp.2d. 856, 857 and 867. The district court held Ms. Manson failed to prove that the Arkansas Democrat-Gazette's stated reasons for terminating her were a pretext for unlawful discrimination. App. 37-38 and 42 F.Supp.2d. at 864. The Eighth Circuit affirmed. App. 47-50 and 200 F.3d. 1172, 1173. The newspaper did not inform Ms. Manson that the three incidents were the basis for her termination when it told her she was fired.

The Age Discrimination in Employment Act does not require employees who recently turned 40 and are part of the protected class to submit more evidence that those persons in the protected class who are in their 50s or 60s.

The first incident was when Ms. Manson wrote an article about a letter United States District Judge William R. Wilson, Jr., had mailed to the appellate and district judges within the Eighth Circuit. The letter expressed Judge Wilson's concern about the Eighth Circuit's decision to remove Judge Henry Woods from Jim Guy Tucker's case at the appellate level, when no such request had been made at the trial level. The Arkansas Democrat-Gazette demanded the identity of the source who gave Ms. Manson the letter. However, Ms. Manson could not reveal her source because she had promised that person she would not reveal the name. Moreover, Ms. Manson stated that Judge Wilson was the source of the story once he acknowledged that he had written the letter. App. 22 and 42 F.Supp.2d. at 858-859. Ms. Manson was given a written reprimand. Ms. Manson responded by writing a memorandum stating that she had no intention of concealing information from her editors. At last, Ms. Manson stated her refusal to identify the source was not contrary to any employment policy at the time. App. 23 and 42 F.Supp.2d. at 864.

The second incident occurred after Ms. Manson interviewed United States District Judge William R. Wilson, Jr. Judge Wilson requested a tape of the interview, or he would not give the interview. Ms. Manson provided the tape since she had paid for it, and she believed that she was not disclosing information to third parties since he was the participant of the interview and he knew what he had said. App. 24-25 and 42 F.Supp. at 859-860. Again, Ms. Manson

articulated that there is no policy to prohibit giving Judge Wilson a copy of the tape. App. 37 and 42 F.Supp.2d. at 864.

The third incident was regarding an article that was published by Ms. Manson's employer, the Arkansas Democrat-Gazette. The article, authored by Ms. Manson, stated the Eighth Circuit Court of Appeals had ignored prior precedent in reaching its decision to remove Judge Henry Woods as the presiding judge over then Arkansas Governor Jim Guy Tucker's criminal trial. Griffin Smith, Jr., the newspaper's Executive Editor, disagreed and ran a correction that stated the Eighth Circuit panel "distinguished, rather than ignored, other 8th Circuit rulings in similar cases." App. 26 and 42 F.Supp.2d. at 860. Ms. Manson stated that she did not mischaracterize what the Eighth Circuit did, and that there was no policy which would force her to submit a statement that would acknowledge her earlier story was incorrect. App. 37 and 42 F.Supp.2d. at 864.

The lower courts have ruled that Ms. Manson has not proven that the reasons for her termination submitted by the newspaper were pretextual. Ms. Manson's petition for rehearing was denied by the Eighth Circuit on March 15, 2000.

ARGUMENT FOR GRANTING WRIT

Turning 40 years old is a milestone in one's life in American culture. It also is the time when a person becomes part of the class of citizens protected under the ADEA, 29 U.S.C. § 621, et seq.

Ms. Manson brought an age discrimination claim against her employer, Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette (hereinafter "Arkansas Democrat-Gazette"). The United States Court of Appeals for the Eighth Circuit affirmed the district court's order granting summary judgment for the newspaper. The district court determined that Ms. Manson failed to prove that the reasons given by the Arkansas Democrat-Gazette for her termination were pretextual.

The district court started and ended its opinion by noting that Ms. Manson was "barely" 40. App. 17 and 45. The district court began by stating, "Manson is now a forty-two year newspaper reporter who worked for the defendant between September of 1993, until her termination on December 26, 1996 (when she would have been barely 40)." App. 17. In concluding Ms. Manson failed to prove that the Arkansas Democrat-Gazette's reasons for her termination were pretextual, the court said, "All she has shown is that she was, at the time of the employer actions complained of, a woman barely 40 years old." App. 44-45. In the footnote to this sentence, the district court stated:

> The court recognizes that Congress had to draw the line somewhere, and chose 40 as the lower limit of the law. However, the court does not believe that, in this day and time, there is really anyone left out there who truly believes that a 40 year old person is 'too old' to do anything, at least in a profession such as Ms. Manson's.

App. 45.

In Morgan v. Arkansas Gazette, 897 F.2d. 945 (8th Cir. 1990), in a split decision, the Eighth Circuit affirmed the jury verdict finding that a newspaper discriminated against an employee because of his age. Sitting by designation, the district judge (who is the district judge in the case at bar) stated in his dissent, "...I am equally convinced that this court errs in affirming the denial of the motion for a judgment notwithstanding the verdict and, in doing so, tells the world that it is extremely dangerous and expensive for any employer to terminate an employee, even one barely over the ADEA's threshold age of 40 years, irrespective of what the employee has done to deserve being terminated." Id., 897 F.2d. at 962 (Waters, J. dissenting).

The decision that now stands is not one that holds an employee has failed to show that the employer's reasons for termination were pretextual. Rather, the decision that now stands holds that – despite Congress' intent and the language of the statute itself – any employee who has just turned 40 is denied

the full protection of the ADEA accorded to employees in their 50s and 60s.

It is a holding that now places an additional burden on persons who have recently become a part of the ADEA's protected class. Employees who have recently turned 40 must now submit more evidence of discrimination than employees in their late 40s, 50s or 60s. Although Ms. Manson was "barely" 40, such a factor is irrelevant in determining whether Ms. Manson can prove the newspaper's reasons for her termination were pretextual. Indeed, Ms. Manson's evidence should not have been diluted because she recently became a part of the ADEA's protected class. One who is closer to 40 should not be punished by having to submit more evidence than someone closer to 50.

The ADEA was designed to remedy a wrong: when employers discriminate against employees because of their age. Durant v. Maher Chevrolet, Inc., 759 F.Supp. 787, 789 (M.D. Florida 1991) ("The ADEA is a remedial statute and should be construed liberally to give full recognition of the remedial aspect." *See also*, DePriest v. Seaway Food Town, Inc., 543 F.Supp. 1355 (E.D. Michigan 1982), which states, "The ADEA is broad, remedial legislation. Thus, its provisions should be liberally construed to effectuate the underlying policies of the Act." Id., 543 F.Supp. at 1358 (citations omitted).

Moreover, "The Age Discrimination in Employment Act (ADEA) provides protection for

persons between the ages of 40 and 65. The purpose of the ADEA was to alleviate serious economic and psychological suffering of persons within this age range, caused by unreasonable prejudice and job discrimination." Polstorff v. Fletcher, 452 F.Supp. 17, 23 (N.D. Alabama 1978) *citing* 29 U.S.C. § 621, 631; U.S. Code Congress and Administrative News 1967, p. 2213, Congressional Record November 6, December 4, 1967 (other citation omitted).

The protected class for the ADEA was to start at 45, however, "The Committee altered the lower age limit from 45 in the original bill to 40, and that testimony indicated this to be the age at which age discrimination in employment becomes evident." U.S. Code Congressional and Administrative News, 1967, p. 2219; Congressional Record November 6, December 4, 1967. Accordingly, the language in 29 U.S.C. § 631 is clear and unambiguous. The legislative history shows the intent of Congress. Congress said 40, and there is no sliding scale that would make discrimination depend, in arithmetic progression, on the number of years over 40 attained by a plaintiff.

Furthermore, whether the Arkansas Democrat-Gazette actually knew Ms. Manson's age is irrelevant. The issue is whether she was terminated because the newspaper thought she was "old." For:

> The purposes of ADEA are clearly set out in 29 U.S.C. s 621 and it is consistent with those purposes to interpret the word 'age' in 29

> U.S.C. s 623(a)(1) to mean more than simple chronological age. 'Age' means 'an advance condition of life,' Webster's Third New International Dictionary (Unabridged) at 40, or 'the condition of being old,' Webster's New World Dictionary (Second College Ed.) at 25.
>
> Thus, so long as plaintiff was in fact within the age limitations of the act, 29 U.S.C. s 631(a), defendant Seaway Food Town could have violated ADEA if it refused to hire plaintiff simply because she was old, even if it did know her actual age.

DePriest v. Seaway Food Town, Inc., 543 F.Supp. at 1358.

Other district courts, when weighing an ADEA plaintiff's evidence, have considered how soon the plaintiff became a part of the ADEA's protected class. In Thorn v. Sundstrand Corp., 1998 WL 668642 (N.D.Ill. September 22, 1998), plaintiff Thorn submitted evidence that all three employees that were laid off from the department were over age 40, and that the evidence was relevant to show pretext. In response, the district court stated, "Of the three above 40, two barely scraped past the ADEA's threshold." Thorn, 1998 WL 668642 at *12. Although the Seventh Circuit did not specifically address this reasoning, the Seventh Circuit did reverse the district court's order of summary judgment for Sundstrand against Thorn in Thorn v. Sundstrand Aerospace Corp., 207 F.3d. 383 (7th Cir. 2000). *See also* Maureau

v. United Technologies Carrier Corporation and XYZ Insurance Company, 1998 WL 426219 (E.D. La. 1998) in which the district court held there was no discriminatory intent where, "Besides plaintiff, the ages of these discharged employees was [sic] 36, 40, and 41, respectively. All three of the other discharged employees were younger than plaintiff. One was not in the protected class and the other two were barely in it." Id., 1998 WL 426219 at *4.

This decision does not only change Ms. Manson's life, but has the potential to affect all members of the ADEA's protected class who have recently turned 40. Employers will use this case against employees in their early 40s who allege age discrimination. So, Ms. Manson does not petition this Court as an individual reporter who feels she has been wronged. Instead, Ms. Manson is a representative of all employees of the ADEA's protected class who are in their early 40s.

The alleged incidents stated by the Arkansas Democrat-Gazette as the basis for terminating Ms. Manson did not entitle the newspaper to an automatic granting of summary judgment. Ms. Manson was never told she was fired because of the three incidents. The first incident that she refused to reveal her source occurred after Ms. Manson wrote an article in 1996. The second incident was when she allowed United States District Judge William R. Wilson, Jr. to have a copy of a taped interview, which occurred in the Fall of 1996, sometime prior to November 22, 1996, when the *Arkansas Times* published the transcript of the

interview on November 26, 1996. App. 26 and 42 F.Supp.2d. at 860. At last, the third incident occurred after the newspaper published an article written by Ms. Manson on December 11, 1996.

The third incident concerned a story in which Ms. Manson wrote that the Eighth Circuit Court of Appeals had ignored prior precedent in a recent decision where District Judge Henry Woods was removed as the presiding judge over then Arkansas Governor Jim Guy Tucker's criminal trial. After the newspaper published the article, its Executive Editor, Griffin Smith, Jr., disagreed with Manson's choice of words. Smith had the newspaper publish a "correction" that stated the Eighth Circuit panel "distinguished, rather than ignored, other Eighth Circuit rulings in similar cases." It was after this third incident that Ms. Manson was removed from covering the federal courthouse. Obviously frustrated over the demotion, Ms. Manson wrote her employer's Executive Editor, saying, "Because I feel that on more than one occasion you have told me one thing and then instructed my supervisors to take actions contrary to your words, please respond to this memorandum in writing. Also, please put in writing any other communications concerning my job status." App. 27-28 and 42 F.Supp.2d. at 861.

The district court held Ms. Manson's letter was questioning "the honesty and integrity of her employer's Executive Editor." App. 27 and 42

F.Supp.2d. at 861. Evidence of Ms. Manson's attitude and any perceived hostile behavior are issues for a jury to resolve. Morgan, 897 F.2d. at 954. When one is subject to age discrimination, it is only natural that that person will feel psychological trauma, hurt and confusion. Ms. Manson's reactions were understandable, and, in any event, were an issue for the jury to decide, for they go directly to whether the newspaper's reasons were pretextual. Whatever the Arkansas Democrat-Gazette "perceived" as hostility from Ms. Manson does not negate or diffuse pretext.

Finally, the district court felt that in this day and age, a 40 year old is not "too old" to do anything, and at least, in a profession such as being a reporter. App. 45 and 42 F.Supp.2d. at 867. The focus in this case is not whether Ms. Manson was physically capable of doing the job, and the bona fide occupational qualification defense is irrelevant. 29 U.S.C. § 623(f)(1). The question is whether the newspaper did not want her as a reporter because they felt that she was "old." In the American culture, unfortunately, if one is considered "old," it is an unjustified stereotype with derogatory perceptions that since one is "old," one is obtuse, senile or dogmatic in thinking. Again, what the Arkansas Democrat-Gazette thought was for the jury to decide, for "There will seldom be 'eyewitness' testimony as to the employer's mental processes." Kunzman v. Enron Corporation, 902 F.Supp. 882, 893 (N.D. Iowa 1995) (citations omitted).

CONCLUSION

For the reasons articulated, we pray that the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PATRICIA MANSON PLAINTIFF

VS. CIVIL NO. LR-C-97-560

LITTLE ROCK NEWSPAPERS, INC. D/B/A ARKANSAS DEMOCRAT-GAZETTE DEFENDANT

MEMORANDUM OPINION

FILED MAY 13, 1998

This case is currently before the court on the defendant's motion to dismiss counts two and three filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For purposes of discussion, we will set forth the facts as they appear from the allegations of the complaint.

Background.

In July of 1997, plaintiff, Patricia Manson, filed this action against her former employer, Little Rock Newspapers, Inc., d/b/a Arkansas Democrat-Gazette.

The complaint asserts the following causes of action: (1) employment discrimination claims under the Age Discrimination in Employment Act (ADEA) and Title VII (sex); (2) a claim of wrongful discharge in violation of Arkansas law; and (3) a claim of intentional infliction of emotional distress or outrage under Arkansas law.

Manson is a forty year old newspaper reporter who between April of 1994 and her demotion on December 17, 1996, had been assigned as the Little Rock, Arkansas, federal court news correspondent. Manson alleges that her reporting ability and her work in general had received praise from at least two federal district judges, the Honorable Henry Woods and the Honorable Bill Wilson, and from her editor.

As federal court news correspondent, Manson alleges her duties included coverage of federal prosecutions arising out of the "Whitewater" investigation into activities of President William Jefferson Clinton and First Lady Hillary Rodham Clinton. Manson states her duties required her to associate with federal judges in connection with the preparation of newspaper articles which had political overtones and, at times, displeased certain governmental or political figures "whom the newspaper sought to please and contained facts which were true but contrary to the partisan political opinions of the Defendant." *Complaint at* ¶ 7. She alleges her "articles were factually accurate in reporting certain federal judges' rulings and their statements related to the 'Whitewater' investigation which were viewed by

officials of the paper including the publisher, Walter E. Hussman, Jr., and the executive editor of the paper, Griffin Smith, Jr., to be favorable to the Clinton administration and not in support of editorial stances published by the newspaper." *Complaint at* ¶ 8.

On some unspecified date, Manson states she was granted an exclusive tape recorded interview by Judge Wilson on the condition that he receive a copy of the tape recorded interview. After the interview, Manson asserts her employer did not like the content of the interview and refused to allow the interview to be printed. After learning the defendant would not publish the interview, it is alleged that Judge Wilson delivered a copy of the interview to another newspaper, the *Arkansas Times*, which published it.

Manson asserts she also wrote an article concerning a letter Judge Wilson had mailed to the appellate and district judges within the Eighth Circuit Court of Appeals expressing his concerns about the Eight [sic] Circuit's break with its own precedent in removing a federal judge from a case after an adverse ruling against the government and by allowing the government to make such request on appeal when no such request had been made at the trial court level. She alleges the defendant, "through its agents including the publisher and executive editor, generally requested concealment, suppression and omission of material facts, through editing and a 'correction' of one article authored by the Plaintiff, if they appeared to be favorable toward President Clinton, his administration or associates." *Complaint at* ¶ 12.

Manson alleges that defendant was so displeased with any reporting of facts which appeared helpful or supportive of President Clinton, his administration or associates, or the Democratic Party, the [sic] she was reprimanded, demoted and eventually discharged on December 26, 1996. She states the discharge came only two weeks after she was praised by the executive editor for the fine job she was doing. She further alleges defendant had a pattern and practice of subjecting older and/or female reporters to more criticism and harsher discipline and assigning them less favorable assignments than those given to younger and/or male reporters and of slanting the reporting against the Democratic Party and the present Office of the Presidency.

She asserts "there is a well-established public policy contained in the First Amendment to the United States Constitution, the Arkansas Constitution, federal statutes and state statutes that recognizes the public's right to know facts concerning the administration of justice, the right to a free press, and the Plaintiff has a right to freedom of association to consult with the government or any department thereof necessary to fulfill her duty as a reporter in promotion of the public's First Amendment right to receive information, as well as Plaintiff's personal right to free speech and freedom of association." *Complaint at* ¶ 15.

As noted above, count one states a claim of age and gender discrimination. Count two sets forth a claim of wrongful discharge. Specifically, in count two

Manson alleges there is an implied covenant of good faith and fair dealing which prohibits discharge for a reason that contravenes public policy. She claims she was "discharged for exercising the public's constitutional right to free association and freedom of speech necessary in the fulfillment of the well-established, inviolate right of the public to liberty of the press and the public's First Amendment right to have information, in an effort by the Defendant to conceal, suppress and omit material facts in the general public's interest." *Complaint at* ¶ 20. Finally, count three asserts a claim of outrage under Arkansas law.

Discussion.

Defendant now requests dismissal of counts two and three pursuant to Rule 12(b)(6). A Rule 12(b)(6) motion is to be read as a whole, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d. 777 (1962), and it is to be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d. 80 (1957); *Bennett v. Berg*, 710 F.2d. 1361 (8th Cir. 1983).

In addition, complaints are to be "liberally construed in favor of the plaintiff." *See Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d. 404 (1969), and *United States v. Advance Machine Corp.*, 547 F.Supp. 1085, 1088 (D. Minn. 1982). It has also been said that all facts pleaded in the

complaint are taken to be true for 12(b)(6) purposes, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d. 338 (1976), and all reasonable inferences from facts pleaded in the complaint are to be drawn and deemed to be true. *See generally* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d. ed. 1990).

1. Wrongful Discharge.

Defendant contends plaintiff was an at-will-employee who could be discharged for good cause, no cause, and even a morally wrong cause. While conceding Arkansas has recognized exceptions to the employment-at-will doctrine, it contends plaintiff does not fall within any of the recognized exceptions. First, it argues an implied covenant of good faith and fair dealing is not a recognized exception. We agree. An alleged breach of the implied covenant of good faith and fair dealing does not state a separate cause of action rather it "is coterminous with, and extends no further than, a cause of action for wrongful discharge in tort." *See e.g., Battista v. United Illuminating Co.,* 10 Conn. App. 486, 495 (1987).

Second, defendant contends public policy does not require a newspaper to publish whatever a reporter desires. In fact, it argues the First Amendment to the United States Constitution protects its exercise of editorial freedom.

While Arkansas has long adhered to the employment-at-will doctrine, it has in recent years

announced modifications to the doctrine. *See e.g. Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d. 380 (1988); *Gladden v. Arkansas Children's Hospital*, 292 Ark. 130, 135, 728 S.W.2d. 501 (1987). *See also Scholtes v. Signal Delivery Service, Inc.*, 548 F.Supp. 487 (W.D. Ark. 1982). It has recognized exceptions when: (1) there is an employment agreement containing a provision for a definite term, in which case firing may be only for cause; (2) there is an express provision against termination except for cause contained in an employee handbook or manual and such provision is relied on by the employee; (3) where an employee is fired in violation of a well-established public policy of the State of Arkansas; and (4) cases in which the employee is discharged for exercising statutory rights or refusing to violate a criminal statute.

In *Sterling Drug* the court held that "an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state." *Sterling Drug*, 294 Ark. at 249. The court noted that "[t]his is a limited exception to the employment-at- will doctrine. It is not meant to protect merely private or proprietary interests." *Id.*

The Arkansas Supreme Court has stated that the public policy of the state is found in its constitution and statutes. *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d. 463 (1991). The court has further indicated that public policy can be contravened "when the reason alleged to be the basis for a discharge is so repugnant to the general good as to deserve the label 'against public policy.'" *Smith v.*

American Greetings Corp., 304 Ark. 596, 804 S.W.2d. 683 (1991). The exceptions are recognized only "*to protect a well-established and substantial public policy... .*" *City of Green Forest v. Morse*, 316 Ark. 540, 547, 873 S.W.2d. 155 (1994). "The existence of a clear and substantial public policy presents a question of law." *Id.*

While the Arkansas courts have not specifically addressed the issue of whether an allegation that someone was discharged for exercising her free speech rights states a cause of action for wrongful discharge, this court in the case of *Parsons v. Burns*, 846 F. Supp. 1372, 1381 (W.D. Ark. 1993) ruled that "a termination in violation of an individual's constitutional rights can form the basis of both a federal claim and a state wrongful discharge claim." The *Parsons* case involved a claim by a nontenured community college teacher that he was discharged in violation of his First Amendment rights. *See also Ark. Const.* art. 2, § 6.

Plaintiff contends there is currently an emerging area of the law concerning the news media and allegations of criminal obstruction of justice. She states there is currently an investigation underway to determine if individuals connected with the White House are using media outlets to obstruct the criminal investigation of President Clinton. Given this emerging area of the law, plaintiff asserts that for a media employer to encourage a reporter to falsify facts in a newspaper article concerning a grand jury investigation fits into the exceptions to the at-will doctrine.

Further, she contends the United States and Arkansas Constitutions recognize the liberty of the press and the free speech rights of all citizens in the public at large. She contends Arkansas clearly recognizes an exception to the employment-at-will doctrine for an employee who was discharged for failing to write false articles at the request of her employer. Manson likens herself to a citizen informant, a crime fighter, or a "whistle blower" and suggests the public's First Amendment right to receive information is a protected right which has been violated by defendant's action. She asserts that political free speech is crucial to a free press and an important public policy issue.

Finally, plaintiff suggests the defendant's motion is premature as the discovery process is not yet complete. She argues discovery must be conducted to determine the nature and extent of the federal judiciary's involvement in the wrongful discharge and outrageous conduct.

Plaintiff, of course, does not have standing to assert the rights of others. Thus, she cannot seek through this wrongful discharge claim to vindicate the rights of the public at large. Despite her self-proclaimed laudatory purpose, the issue before us is much narrower than Manson seeks to portray it. The issue before us is not whether the public has a right to know the information she sought to convey; rather, the issue is whether defendant's conduct in editing her materials, refusing to print her article, and in

ultimately terminating her violated her rights of free speech or free association, and, therefore the public policy of the State of Arkansas.

"The right of freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *Avins v. Rutgers State University of N.J.*, 385 F.2d. 151, 152 (3d Cir. 1967). "Nor does freedom of speech comprehend the right to speak on any subject at any time." *Id.* At 153. "Thus, one who claims that [her] constitutional right to freedom of speech has been abridged must show that [she] has a right to use the particular medium through which [she] seeks to speak." *Id.*

A reporter has no free-standing First Amendment right to have her articles published by a privately-owned newspaper for which she works. *Cf., Denver Area Educ. Telecom. Consortium v. F.C.C.*, 518 U.S. 727, 116 S.Ct. 2374, 2421, 135 L.Ed.2d. 888 (1996) (Thomas, J., concurring in part and dissenting in part); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58, 94 S.Ct. 2831, 41 L.Ed.2d. 730 (1974). The rights of members of the news media are "coextensive with and do not exceed those of members of the public in general." *In re Greensboro News Co.*, 727 F.2d. 1320, 1322 (4th Cir. 1984).

As defendant correctly points out, the state cannot restrict the free expression rights of a newspaper's owners or publishers. The Supreme Court stated in *Miami Herald Publishing Company v. Tornillo*, stated [sic]:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials ... whether fair or unfair ... constitute the exercise of editorial control and judgment. It has yet to be demonstrated now [sic] governmental regulation of this crucial process can be exercised consistent with first amendment guarantees of a free press as they have evolved to this time.

Miami Herald, 418 U.S. at 258. In short, defendant has the right to control the content of the paper. *Cf. Janklow v. Mewsweek* [sic], *Inc.*, 788 F.2d. 1300 (8th Cir. 1986) (Courts must be slow to intrude into area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Under the First Amendment, choice of what to select must almost always be left to writers and editors).

Article 2, Section 6 of the Arkansas Constitution provides that "[t]he liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right." Ark. Const. art. 2, § 6. To force a privately owned newspaper to publish articles written by its reporters

against their editorial judgment would be to advance the First Amendment rights of the reporter over the free press rights granted to the newspaper. A reporter is employed to cover the news and write articles. It is the reporter's job performance and innumerable other facts that enter into the editor's decisions.

> Editorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses. This conclusion is illustrated by a well-worded opinion by Chief Justice Burger: "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded only by two factors: first, the acceptance of a sufficient number of readers - - and hence advertisers - - to assure financial success; and second, the journalistic integrity of its editors and publishers."

Nelson v. McClatchy Newspapers, Inc., 936 P.2d. 1123, 1131 (Wash. 1997), *cert. denied*, 118 S.Ct. 175 (1997) (*quoting, Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117, 93 S.Ct. 2080, 2094, 36 L.Ed.2d. 772 (1973) (Burger, C.J., plurality op.)). In fact, it has been said that editorial integrity is to a newspaper what machinery is to a manufacturer. *Newspaper Guild of Greater Philadelphia, Local 10 v. N.L.R.B.*, 636 F.2d. 550, 560 (D.C. Cir. 1980).

Thus, to the extent plaintiff's action seeks to challenge the defendant's exercise of editorial discretion, *i.e.*, the decisions to edit and/or not print certain articles she authored, Manson has failed to state a claim. However to the extent Manson alleges defendant attempted to force her to falsify or conceal information or to the extent it attempted to retaliate against her for opinions she expressed that were unrelated to her employment duties, we cannot say she has failed to state a claim.

2. Outrage.

Plaintiff's complaint also includes a claim for intentional infliction of emotional distress, commonly referred to in Arkansas as the tort of outrage. For the plaintiff to establish this claim, she must demonstrate four elements: (1) the defendant intended to inflict emotional distress or should have recognized emotional distress as a likely result; (2) the defendant's conduct was extreme, outrageous and utterly intolerable in a civilized community; (3) the defendant's actions caused anguish or distress to the plaintiff; and (4) the emotional distress suffered was severe and of a type that no reasonable person should be expected to endure. *Holloman v. Keadle*, 326 Ark. 168, 171, 931 S.W.2d. 413 (1996) (citations omitted).

Extreme and outrageous conduct is "conduct that is so outrageous in character, and so extreme in degree, as to [sic] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized society." *M.B.M. v. Counce*, 268 Ark. 269, 596 S.W.2d. 681 (1980). In addition, the "emotional distress for which damages may be sought must be so severe that no reasonable person could be expected to endure it." *Id.*

The tort is not easily established and requires clear cut proof. *Ross v. Patterson*, 307 Ark. 68, 817 S.W.2d. 418 (1991). *See also Holloman v. Keadle*, 326 Ark. 168, 931 S.W.2d. 413 (1996). "Merely describing the conduct as outrageous does not make it so." *McQuay v. Guntharp*, 331 Ark. 466, 471, ___ S.W.2d. ___ (1998) (citation omitted). "Clear-cut proof, however, does not mean proof greater than a preponderance of the evidence." *McQuay*, 331 Ark. at 471 (citation omitted).

The Arkansas courts have adhered to this narrow view of the tort particularly in the employment context. "Review of outrage claims in employment situations is particularly strict because 'an employer must be given a certain amount of latitude in dealing with employees.'" *Freeman v. Bechtel Construction Co.*, 87 F.3d. 1029, 1031 (8th Cir. 1996) (*quoting, Sterling v. Upjohn Healthcare Services, Inc.*, 299 Ark. 278, 772 S.W.2d. 329, 330 (1989)).

Here, defendant contends plaintiff has failed to state a claim for outrage under Arkansas law. We agree. Taking as true all facts alleged in the complaint, we believe the allegations fall far short of those necessary to establish this tort in Arkansas. We see no facts that would support a finding of "extreme

and outrageous" conduct that was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community." *See e.g., Shepherd v. Washington County*, 331 Ark. 480, 508, 962 S.W.2d. 779 (1998).

Conclusion.

For the reasons stated, a separate order will be entered granting in part and denying in part defendant's motion to dismiss.

Dated: May 11, 1998

/s/_____
H. Franklin Waters
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PATRICIA MANSON PLAINTIFF

VS. CIVIL NO. LR-C-97-560

LITTLE ROCK NEWSPAPERS, INC. D/B/A DEFENDANT

ARKANSAS DEMOCRAT-GAZETTE

ORDER

FILED MAY 13, 1998

On this 11th day of May, 1998, upon consideration of the defendant's motion to dismiss counts two and three of the complaint, the court finds for the reasons stated in a memorandum opinion of even date that the motion should be granted in part and denied in part. Specifically, the court grants the motion to dismiss with respect to count three of the complaint.

It is so ordered.

/s/_____
H. Franklin Waters
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PATRICIA MANSON PLAINTIFF

VS. CIVIL NO. LR-C-97-560

LITTLE ROCK NEWSPAPERS, INC. D/B/A ARKANSAS DEMOCRAT-GAZETTE — DEFENDANT

MEMORANDUM OPINION

FILED MARCH 9, 1999

Patricia Manson filed this lawsuit against her former employer, Little Rock Newspapers, Inc., d/b/a *Arkansas Democrat-Gazette*, alleging that she was terminated in violation of the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act. Manson also alleges that she was wrongfully discharged in violation of Arkansas law.[1] Trial is currently set to begin on March 15, 1999.

Background.

Manson is now a forty-two year old newspaper reporter who worked for the defendant between September of 1993, until her termination on December 26, 1996 (when she would have been barely 40). Manson was a "general assignment reporter" for the first six months of her employment with the defendant, which meant she covered "a little bit of everything" and did not have a particular beat. *Patricia Manson's*

[1] Manson also asserted a claim for outrage. The Court dismissed that claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in an order filed May 13, 1998.

Deposition, at 83. While Manson was a general assignment reporter, she was supervised by Lisa Thompson and Glen Chase. Manson stated at her deposition that "as a general rule" she did not perceive that she was being discriminated against because she was a woman during her term as a general assignment reporter. *Patricia Manson's Deposition*, at 84-85.

Manson does believe, however, that she was discriminated against by David Bailey, the City Editor, during her first six months as a general assignment reporter. Specifically, Manson asserts that because she did not socialize with Bailey, *i.e.,* she did not occasionally go out for a beer with him, she was not assigned to certain stories. *Id.,* at 85. Manson stated she felt like Bailey did not like her based on "the way he talked to [her]" and "the tone of voice he used." *Id.,* at 88. Manson further stated that she felt Bailey was threatened by her because she was an experienced female reporter who was good at her job. *Id.* Manson asserts that Bailey discriminated against "experienced female reporters." *Id.,* at 89. Manson was in her "late thirties" when she alleges Bailey began discriminating against her because of her sex and her age. *Id.*

Manson asserts that Bailey also discriminated against David Kern and Bobbie Nesbitt because they were experienced reporters, *i.e.,* "over forty" years old. *Id.,* at 90. Bailey denies Manson's accusations and asserts that David Kern resigned on February 13, 1995, following an unsatisfactory evaluation by Chase, his supervisor. *David Bailey's Affidavit,* at ¶ 13. Bailey

further asserts that Bobbie Ridlehoover (same person as Bobbie Nesbitt) was a white female who was terminated in December of 1993 for unsatisfactory work performance. *David Bailey's Affidavit,* at ¶ 12. Bailey states that he did not make the decision to terminate Ridlehoover and expressed uncertainty at the time as to whether termination was the correct decision. *Id.*

In April of 1994, Manson was assigned as the Little Rock, Arkansas, federal court news correspondent. As federal court news correspondent, Manson continued to report directly to Thompson and Chase. Although Bailey never directly supervised Manson, he was responsible for managing Manson's supervisors, Thompson and Chase. Bailey asserts that as the City Editor, he was responsible for "overseeing the editing process." *Id.,* at ¶ 3. He further asserts that:

> [a]ll news stories written by reporters are subjected to an editing process during which editors assess the value of proposed stories and review, revise, and determine whether to publish stories submitted by reporters and edit or modify stories prior to publication in the newspaper. No reporter at the ADG is given the authority or right to dictate to the editors which particular stories will appear, and in what form, in the newspaper.

Id.

Manson asserts that her primary duty was to report on the news from and concerning the federal courts in Arkansas, which included covering the federal prosecutions arising out of the "Whitewater" investigation into activities of President William Jefferson Clinton and First Lady Hillary Rodham Clinton. Manson states her duties required her to associate with federal judges in connection with the preparation of newspaper articles which had political overtones and, at times, displeased certain governmental or political figures "whom the newspaper sought to please and contained facts which were true but contrary to the partisan political opinions of the Defendant." *Complaint*, at ¶ 7. Manson further alleges that her "articles were factually accurate in reporting certain federal judges' rulings and their statements related to the 'Whitewater' investigation which were viewed by officials of the paper, including the publisher, Walter E. Hussman, Jr., and the executive editor of the paper, Griffin Smith, Jr., to be favorable to the Clinton administration and not in support of editorial stances published by the newspaper." *Id.*, ¶ 8.

Manson asserts that from the instructions given to her by her editors concerning her coverage of Whitewater, and in particular her coverage of the trials of Jim Guy Tucker and Jim and Susan McDougal, she believed that she was being told to "give the wrong impression" about issues concerning Whitewater. *Patricia Manson's Deposition*, at 115. Manson

admitted, however, that she was never "directly told to put false information" in a story concerning Whitewater. *Id.*, at 115-116.[2]

Manson was demoted and later terminated from her position as federal court news correspondent in December, 1996. Bailey stated that the decision to demote and terminate Manson was based on three incidents that occurred in 1996.

The first incident concerned an article written by Manson about a letter Judge William R. Wilson, Jr., had mailed to the appellate and district judges within the Eighth Circuit. The letter expressed Judge Wilson's concerns about the Eighth Circuit's decision to remove Judge Henry Woods from Jim Guy Tucker's case at the appellate level when no such request had been made at the trial court level. Defendant requested the identity of the source who gave her the letter that Judge Wilson wrote, but Manson refused to reveal her source. Manson asserts that she did not reveal her source for the following reasons:

> I had promised that person I would not reveal the name, and I realized I had not been clear with that person. I had not

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[2] Even though Manson made this statement at her deposition, in her statement of material facts in dispute, she asserts that she was asked to conceal information and that defendant requested that she print a story that was not true. *Plaintiff's Statement of Material Facts in Dispute*, at ¶ 3.

> made it clear that I might tell my editors if they asked, and I did not want to take advantage of a misunderstanding that I had unintentionally created. Also that person was not the source of the story. Bill Wilson was the source of the story, once he acknowledged that he had written the letter.

Patricia Manson's Deposition, at 169. Manson asserts that she would not reveal the source based on the Supreme Court's interpretation of the Constitution.[3] Manson further asserts that the identity of her source was irrelevant because the source of the story was Judge Wilson and his letter, and not the individual who provided her with a copy of the letter.

As a result of her refusal to reveal her source, Manson was disciplined by Bailey. Bailey takes the position that Manson's refusal "was a breach of her obligation first and foremost as a reporter for the ADG, and a compromise of her journalistic integrity." *David Bailey's Affidavit,* at ¶ 5. Bailey placed a written reprimand in Manson's personnel file that stated in relevant part:

> Your recent failure to clearly set applicable terms for receipt of material

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[3] Manson asserts that the Arkansas Shield Statute, Arkansas Code Annotated § 16-58-510 (Michie 1987), may also play a part in her refusal to reveal her source. *See Patricia Manson's Deposition,* at 170.

> from a confidential source and your resulting refusal to reveal the source to the executive director of the newspaper or to your supervising editor constitute a breach of duty that could justify termination of your employment.

Defendant's Exhibit "4."

Manson responded by writing a memorandum to Bailey stating that his reprimand was "unduly harsh and gives the wrong impression of [her] actions." *Defendant's Exhibit "5."* Manson stated that her failure to "clearly set out the terms under which [she] received material from a confidential source was an oversight" and was not "an intentional effort to conceal information from [her] editors." *Id.*

Manson also alleges that the refusal to identify a confidential source was a fairly routine practice at the *Arkansas Democrat-Gazette* at that time and that no one had been reprimanded for such behavior other than her. *See Plaintiff's Brief in Support of Response to Motion for Summary Judgment*, at 4. In support of this claim, Manson offers the deposition testimony of Rodney Bowers who worked for defendant as a reporter during the same period of time. His testimony, however, does not seem to support this contention. Bowers testified at his deposition that Griffin Smith asked him to reveal his source for an article written on February 15, 1997, regarding the Whitewater investigation, and that he revealed his source on the condition that his source's name would

never be revealed in court. *See Rodney Bower's Deposition*, at 15-16. Bowers stated the understood defendant had a written confidential source policy that stated reporters could be asked by an editor who their source was and were required to divulge their source. *Id.*, at 24-25. Manson acknowledged that she believed that the "better practice" is to reveal her source to her editors if a question arises as to the credibility of those sources. *Defendant's Exhibit "5."*

The second incident concerned an interview that Manson had with Judge Wilson. Specifically, at some unspecified date in 1996, Manson was granted an interview by Judge Wilson. Manson recited the incidents that led up to her interview with Judge Wilson at her deposition:

> I had heard around the courthouse that Bill Wilson was willing to go on the record about Whitewater. So I thought it probably wasn't true, but I thought I'd check it out. Glen Chase had told me several months before that if I ever talked to a judge on the record, I should tape the interview. And so I took my tape recorder, and I asked Bill Wilson if I could interview him about Whitewater, and he said, "Yes." And I said I wanted to tape the interview, and he said he wouldn't give the interview unless I let him have a copy of the tape after I was finished with it. I figured that I didn't have any problem with giving him the

tape after I was finished with it, because he knew what he had said. It wasn't like I was turning over information that I shouldn't be giving to outsiders, and so I agreed to that.

And during the interview I kept trying to steer him to talk about Whitewater, but he kept going on and on about Paul Greenberg[4]. After the interview, I called Glen Chase and told him what had happened, and he said he'd check and see if the paper wanted a story. He called me back later that day, said he discussed it with – I forget who he said he discussed it with, but they decided they didn't want a story. That this was something more appropriate for the editorial page, and I think he said someone had suggested that Wilson write a letter to the editor.

Patricia *Manson's Deposition*, at 159-160.

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[4] Paul Greenberg is the editor of the editorial page and an editorial writer for defendant newspaper. According to the *Arkansas Times* article, Judge Wilson "is frequently and sharply criticized in the writings of Paul Greenberg, editor of the editorial page of the *Arkansas Democrat-Gazette*, the state's largest newspaper." *Defendant's Exhibit "6."*

A few days later, Manson gave Judge Wilson the original tape of the interview. *Id.*, at 160. After learning the defendant would not publish the interview, Judge Wilson, by letter, portions of which were quoted in the article, delivered a copy of what apparently was a transcript of the interview to another newspaper, the *Arkansas Times*, a competitor, which published it on November 22, 1996. *See Defendant's Exhibit "6."* Bailey asserts that Manson's decision to give the tape of her interview to Judge Wilson was "improper and a breach of her duty to protect her work product for her employer." *David Bailey's Affidavit*, at ¶ 6.

The third incident occurred when on December 11, 1996, defendant published a story written by Manson in which Manson stated that the Eighth Circuit Court of Appeals had "ignored" prior precedent in reaching its decision to remove Judge Henry Woods as the presiding judge over Tucker's criminal trial. Griffin Smith, Jr., defendant's Executive Editor, disagreed with Manson's choice of words. As a result, a correction was printed that stated the Eighth Circuit panel "distinguished, rather than ignored, other 8th Circuit rulings in similar cases." *Defendant's Exhibit "8."* The correction stated that the previous story had "misstated the panel's decision." *Id.* Manson sent a memorandum to Griffin Smith, Jr., stating that she believed the correction "incorrectly asserts that [she] misstated the panel's decision." *Defendant's Exhibit "9."*

Bailey asserts that after these three incidents, he and Griffin Smith, Jr., discussed what action should be taken against Manson. Bailey asserts that they agreed that Manson should be removed from covering the federal courthouse. On December 17, 1996, Bailey removed Manson from covering the federal courthouse, and returned her to the position as a general assignment reporter working under Chase. Manson wrote a memorandum to Griffin Smith regarding her demotion that stated in part:

> I believe this action was taken because my attempts to place Whitewater in perspective and what in my opinion was accurate reporting offended your conservative political views, as well as those of the Democrat-Gazette's publisher, other newspaper employees and some members of the Arkansas legal community. I believe my attempts to place Whitewater in perspective and what in my opinion was accurate reporting also embarrassed certain members of the 8th Circuit.

She then goes on to question the honesty and integrity of her employer's executive editor by saying:

> Because I feel that on more than one occasion you have told me one thing and then instructed my supervisors to take actions contrary to your words, please respond to this memorandum in writing.

> Also, please put in writing any other communications concerning my job status.

Defendant's Exhibit "14."

Her employer obliged six days later by advising her, in writing, that her "services as a reporter at the Democrat-Gazette are no longer needed." *Defendant's Exhibit "15."* The termination letter was dated December 26, 1996.

Manson stated at her deposition that she also believes that, although her Whitewater coverage was the "immediate trigger" for her removal, her age and sex were also factors. *Patricia Manson's Deposition*, at 176. Specifically, Manson stated that her age and sex:

> played a part in the paper's, David Bailey's and other editors', their dislike for me, their treatment of me, combined with the – their dislike of my – their – the fact that they didn't like my Whitewater reporting, because I didn't slant my reporting to coincide with the paper's editorial view. I think those were all involved in the paper's editorial treatment of me. The reasons cited for my removal from the federal courthouse all involved Whitewater, and that's what I was focusing on in this memo.

Id., at 178. Manson stated that on December 20, 1996, the date she wrote the above memorandum, she believed that she was being discriminated against on the basis of age and sex, in addition to the fact that she believed the action was taken because of her Whitewater coverage. *Id.*, at 181.

Defendant had a policy regarding discrimination which stated that the company did not permit illegal discrimination and that if any employee felt that he or she was a victim of harassment or discrimination, he or she should "promptly report the complaint to the department head or the personnel director within 24 hours of the incident." *Exhibit "8" to Patricia Manson's Deposition.* Manson stated at her deposition that she does not recall ever seeing defendant's policy, but that she did not go to any editors or any management to complain about discrimination based on sex or age because she thought it would be useless. *Patricia Manson's Deposition,* at 165.

Manson filed a charge of discrimination on March 13, 1997, stating that she believed that she was reprimanded, demoted and terminated because:

> (a) I am over forty (40) and female. (b) The newspaper perceived that certain federal judges respected by reporting ability. (c) The newspaper believed my reporting undercut its editorial stance. The newspaper also sought to please certain government and/or political

> figures the newspaper believed were displeased or offended by my reporting.

Defendant's Exhibit "16."

Summary Judgment Standard.

"Summary judgment is only appropriate when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Callahan v. Runyon*, 75 F.3d. 1293, 1296 (8th Cir. 1996) (citations omitted). All disputed facts are resolved and all inferences drawn in favor of the nonmoving party. *Id.*

The Eighth Circuit has advised trial courts that summary judgments should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d. 725 (8th Cir. 1979). This is especially true in discrimination cases because they often turn on inferences rather than direct evidence. Thus, the court has stated: "we are particularly deferential to the non-moving party alleging discrimination." *Webb v. Garelick Mfg. Co.*, 94 F.3d. 484, 486 (8th Cir. 1996).

The court has made it clear, however, that the non-moving party "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *National Bank of Commerce v. Dow Chemical Co.*, 165 F.3d. 602, 607 (8th Cir. 1999) (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio*

Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d. 538 (1986)). Rather, the non-moving party "must show there is sufficient evidence to support a jury verdict in [her] favor." *Id.* (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d. 202 (1986)).

Discussion.

1. Employment Discrimination:

The ADEA provides that "[i]t shall be unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual ... because of such individual's age." 29 U.S.C. § 623 (1985). The ADEA applies to "individuals who are at least 40 years of age." 29 U.S.C. § 631 (Supp. 1998). Likewise, Title VII makes it unlawful for an employer "to discharge any individual, or otherwise discriminate against any individual ... because of such individual's sex." 42 U.S.C. § 2000e-2(a)(1) (1994).

A plaintiff may establish age or sex discrimination by direct or indirect evidence. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 668 (1973); *Fast v. Southern Union Co., Inc.*, 149 F.3d. 885 (8th Cir. 1998). The legal analysis under the ADEA parallels the analysis under Title VII, and, thus, the court will address both claims together. *See Hase v. Missouri Div. Of Employment Sec.*, 972 F.2d. 893, 896 (8th Cir. 1992).

When relying on indirect evidence, a plaintiff uses the burden-shifting framework identified in *McDonnell-Douglas v. Green*. *See, e.g., Price v. S-B Power Tool*, 75 F.3d. 362, 364-65 (8th Cir. 1996). To establish a prima facie case of discrimination in the termination context, the plaintiff must show: (1) she is age forty or over and/or a member of a protected class; (2) that she met applicable job qualifications and satisfied the jobs [sic] normal requirements; (3) that despite these qualifications, she was demoted and/or discharged; and (4) she was replaced by a younger person and/or a man. *Hindman v. Transkrit Corp.*, 145 F.3d. 986, 990 (8th Cir. 1998). Additionally, the plaintiff must demonstrate that the discharge occurred in "circumstances which allow the court to infer unlawful discrimination." *Davenport v. Riverview Gardens School Dist.*, 30 F.3d. 940, 945 (8th Cir. 1994) (internal quotation marks and citations omitted). *See also Williams v. Ford Motor Co.*, 14 F.3d. 1305, 1308 (8th Cir. 1994).

> [The] presentation of a prima facie case creates a legal presumption of unlawful discrimination. This presumption places an obligation upon the employer to produce evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge. If the employer carries this burden, the *legal* presumption of unlawful discrimination "drops out of the picture."

Ryther v. KARE 11, 108 F.3d. 832, 836 (8th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2510, 138 L.Ed.2d. 1013 (1997) (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-12, 113 S.Ct. 2742, 2747-50, 125 L.Ed.2d. 407 (1993)).

The court went on to say:

> [i]n sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. Furthermore, as the *Hicks* Court explained, then plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination.

Ryther, 108 F.3d. at 837-38 (*citing Hicks*, 509 U.S. at 511 n. 4, 113 S.Ct. at 2750) (footnotes omitted).

As noted above, "[t]he employee at all times retains the burden of persuading the trier of fact that he has been the victim of illegal discrimination due to his [age]." *Benson v. Northwest Airlines, Inc.*, 62 F.3d. 1328, 1337 (8th Cir. 1996).

A plaintiff may also prove her case by presenting direct evidence of discrimination, but Manson has not presented any direct evidence of age or gender discrimination. Thus, the court turns to an analysis of Manson's case under the *McDonnell-Douglas* burden shifting framework.

In *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d. 957 (1978), the Supreme Court said:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all

> legitimate reasons for [firing an employee within a protected class] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration.

(citation omitted).

"One common way to raise an inference is to prove disparate treatment by showing that [plaintiff] was treated less favorably than similarly situated employees who are not in plaintiff's protected class." *Wallin v. Minnesota Dep't of Corrections,* 153 F.3d. 681, 687 (8th Cir. 1998), *cert. denied,* ___ U.S. ___, ___ S.Ct. ___, 67 U.S.L.W. 3410 (U.S. Mar. 8, 1999) (internal quotation marks and citation omitted). "Employees are similarly situated when they are involved in or accused of the same or similar conduct and are disciplined in different ways." *Id.* (internal quotation marks and citation omitted).

Defendant asserts Manson cannot establish a prima facie case of intentional discrimination on the basis of her age or sex. Defendant further asserts that even if the court finds that Manson has made a prima facie showing, it has come forward with legitimate non-discriminatory reasons for discharging Manson, namely, her pattern of poor judgment and insubordination in the months prior to her termination. Furthermore, defendant asserts that Manson cannot

establish that its reason for terminating her was merely pretext for illegal discrimination.

Manson asserts that she can establish a prima facie case of discrimination because: (1) she is a member of a protected class, *i.e.*, she is over forty years old and she is a female; (2) she was qualified for the position she held as a federal court news correspondent; and (3) she was demoted and later terminated. Manson asserts that the court can infer unlawful discrimination because was [sic] replaced by a younger male employee.[5]

The court does not believe that plaintiff has met the *McDonnell-Douglas* test because it is clear that Manson had not met her employer's legitimate expectations and, thus, did not satisfy the job's normal requirements, and, as already indicated, she has failed to show that she was replaced by a male or someone younger than her rather young 40 years of age. However, even if the court accepted, for purposes of this summary judgment motion, that Manson had proffered enough evidence to establish a prima facie case of discrimination, there is no question that defendant has put forth legitimate non-discriminatory reasons for her termination. Thus, Manson can only survive summary judgment by proving pretext, *i.e.*, by

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[5] Despite Manson's statement that "there is no dispute that [she] was replaced by a younger male employee," there is nothing in the record that substantiates her assertion. *Plaintiff's Brief in Support of Response to Motion for Summary Judgment*, at 4.

proving that she was treated less favorably than similarly situated employees who are not in her protected classes, or, in some other manner, has shown that the employer's proffered reasons for its actions are not worthy of belief.

Manson asserts that the reasons defendant puts forward for her termination are clearly pretextual. First, with respect to her refusal to identify her source, Manson asserts that the refusal to identify a confidential source was a routine practice at the *Arkansas Democrat-Gazette*, and that no employment policy to the contrary existed at the time. Second, with respect to her conduct in giving Judge Wilson the original of his tape-recorded interview, Manson asserts that there was no policy that prohibited or admonished such behavior. Finally, with respect to the "correction" published by defendant, Manson asserts that she refused to submit to a statement that acknowledged her earlier story was incorrect, and that there was no policy that existed which prohibited her actions.

Manson has simply not met her burden on the issue of pretext. She has not come forward with any evidence, other than her own assertions, that other *Arkansas Democrat-Gazette* reporters, who are younger and male, were treated more favorably than she was treated under similar circumstances. In fact, Bowers testified that defendant had a policy of requiring its reporters to reveal his or her source to an editor if asked to do so. In addition, Manson admitted that the better practice is to reveal her source to her

editor. Similarly, there is no evidence that the other incidents cited by defendant as grounds for Manson's termination were pretextual. In other words, the court finds that all of the reasons given by defendant as grounds for Manson's termination are legitimate, and that no reasonable person could believe that defendant based its decisions on any impermissible considerations such as Manson's age or sex.

2. Wrongful Discharge.

Defendant contends plaintiff was an at-will-employee who could be discharged for good cause, no cause, and even a morally wrong cause. Second, defendant contends public policy does not require a newspaper to publish whatever a reporter desires. In fact, it argues the First Amendment to the United States Constitution protects its exercise of editorial freedom.

While Arkansas has long adhered to the employment-at-will doctrine, it has in recent years announced modifications to the doctrine. *See e.g. Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d. 380 (1988); *Gladden v. Arkansas Children's Hospital*, 292 Ark. 130, 135, 728 S.W.2d. 501 (1987). *See also Scholtes v. Signal Delivery Service, Inc.*, 548 F.Supp. 487 (W.D. Ark. 1982). It has recognized exceptions when: (1) there is an employment agreement containing a provision for a definite term, in which case firing may be only for cause; (2) there is an express provision against termination except for cause contained in an employee

handbook or manual and such provision is relied on by the employee; (3) where an employee is fired in violation of a well-established public policy of the State of Arkansas; and (4) cases in which the employee is discharged for exercising statutory rights or refusing to violate a criminal statute. Manson asserts that she falls within the third exception to the at-will doctrine, *i.e.*, that she was terminated because she refused to falsify and conceal information which is in violation of the public policy of the State of Arkansas.

In *Sterling Drug* the court held that "an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state." *Sterling Drug*, 294 Ark. at 249. The court noted that "[t]his is a limited exception to the employment-at-will doctrine. It is not meant to protect merely private or proprietary interests." *Id.*

The Arkansas Supreme Court has stated that the public policy of the state is found in its constitution and statutes. *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d. 463 (1991). The court has further indicated that public policy can be contravened "when the reason alleged to be the basis for a discharge is so repugnant to the general good as to deserve the label 'against public policy.'" *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d. 683 (1991). The exceptions are recognized only "*to protect a well-established and substantial public policy... .*" *City of Green Forest v. Morse*, 316 Ark. 540, 547, 873 S.W.2d. 155 (1994). "The existence of

a clear and substantial public policy presents a question of law." *Id.*

While the Arkansas courts have not specifically addressed the issue of whether an allegation that someone was discharged for exercising her free speech rights states a cause of action for wrongful discharge, this court in the case of *Parsons v. Burns*, 846 F. Supp. 1372, 1381 (W.D. Ark. 1993) ruled that "a termination in violation of an individual's constitutional rights can form the basis of both a federal claim and a state wrongful discharge claim." The *Parsons* case involved a claim by a nontenured community college teacher that he was discharged in violation of his First Amendment rights. *See also Ark. Const.* art. 2, § 6.

As the court stated in its previous opinion, "[t]he right of freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *Avins v. Rutgers State University of N.J.*, 385 F.2d. 151, 152 (3d Cir. 1967) "Nor does freedom of speech comprehend the right to speak on any subject at any time." *Id* at 153. "Thus, one who claims that [her] constitutional right to freedom of speech has been abridged must show that [she] has a right to use the particular medium through which [she] seeks to speak." *Id.*

A reporter has no free-standing First Amendment right to have her articles published by a privately-owned newspaper for which she works. *Cf., Denver Area Educ. Telecom. Consortium v. F.C.C.*, 518 U.S. 727, 116 S.Ct. 2374, 2421, 135 L.Ed.2d. 888

(1996) (Thomas, J., concurring in part and dissenting in part); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58, 94 S.Ct. 2831, 41 L.Ed.2d. 730 (1974). The rights of members of the news media are "coextensive with and do not exceed those of members of the public in general." *In re Greensboro News Co.*, 727 F.2d. 1320, 1322 (4th Cir. 1984).

As defendant correctly points out, the state cannot restrict the free expression rights of a newspaper's owners or publishers. The Supreme Court stated in *Miami Herald Publishing Company v. Tornillo*, stated [sic]:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials ... whether fair or unfair ... constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with first amendment guarantees of a free press as they have evolved to this time.

Miami Herald, 418 U.S. at 258. In short, defendant has the right to control the content of the paper. *Cf. Janklow v. Mewsweek* [sic], *Inc.*, 788 F.2d. 1300 (8th Cir. 1986) (Courts must be slow to intrude into area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Under the First

Amendment, choice of what to select must almost always be left to writers and editors).

Article 2, Section 6 of the Arkansas Constitution provides that "[t]he liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right." Ark. Const. art. 2, § 6. To force a privately owned newspaper to publish articles written by its reporters against their editorial judgment would be to advance the First Amendment rights of the reporter over the free press rights granted to the newspaper. A reporter is employed to cover the news and write articles. It is the reporter's job performance and innumerable other facts that enter into the editor's decisions.

> Editorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses. This conclusion is illustrated by a well-worded opinion by Chief Justice Burger: "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded only by two factors: first, the acceptance of a sufficient number of readers - - and hence advertisers - - to assure financial success; and second, the journalistic integrity of its editors and publishers."

Nelson v. McClatchy Newspapers, Inc., 936 P.2d. 1123, 1131 (Wash. 1997), *cert. denied*, 118 S.Ct. 175 (1997) (*quoting, Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117, 93 S.Ct. 2080, 2094, 36 L.Ed.2d. 772 (1973) (Burger, C.J., plurality op.)). In fact, it has been said that editorial integrity is to a newspaper what machinery is to a manufacturer. *Newspaper Guild of Greater Philadelphia, Local 10 v. N.L.R.B.*, 636 F.2d. 550, 560 (D.C. Cir. 1980).

Manson asserts that through defendant's instructions, she was given the impression that she was to "slant [her] reporting and to give misimpression about what was really going on:" *Patricia Manson's Deposition*, at 117. Manson further asserts that when she refused to draft a "false correction," she was demoted and the correction was run in her absence. *Plaintiff's Brief in Support of Response to Motion for Summary Judgment*, at 7. Thus, Manson asserts she was terminated "based on her refusal to conceal and falsify information in violation of her First Amendment Rights and the public policy of Arkansas." *Id.* As stated earlier, however, Manson conceded in her deposition that she was never directly told to put false information in a story. *Id.*, at 115. In addition, she stated that, "[t]here weren't any falsehoods inserted into any of [her] stories that [she] [could] remember." *Id.*, at 117. Apparently, Manson believes that the decision by her editors to change the word "ignored" to "distinguished" constituted a falsification of the Eighth Circuit's decision. Manson

further contends that the defendant's request that she "slant" her stories in favor of a prosecutor, *i.e.*, Kenneth Starr, violated public policy because such false stories "could arguably affect a appellate court's decision." *Plaintiff's Brief in Support of Motion for Summary Judgment*, at 7.

The court concludes that Manson has failed to create a genuine issue of material fact with respect to the issue of whether she was discharged in violation of Arkansas public policy. The *Arkansas Democrat-Gazette* has the right to advance its own political, social, and economic views, and there is no evidence that its editors attempted to get Manson to falsify or conceal information in her stories.

Conclusion.

For the reasons stated, defendant's motion for summary judgment will be granted. Plaintiff simply has no case, at least not a federal one, and no reasonable person could believe that she does.

The court mentioned earlier that the courts have developed two tests to aid in determining when employment discrimination has occurred - - the direct evidence and indirect evidence approaches. Plaintiff does not contend that she has presented sufficient direct evidence to meet her burden, and, as indicated, she has fallen woefully short of meeting the indirect evidence test. All she has shown is that she was, at the

time of the employer actions complained of, a woman barely 40 years old.[6]

In short, plaintiff says, and all she has shown is, that: "I'm a woman. I'm 40 years old. The employer didn't treat me right. They must have done it because I am a 40 year old woman." That simply does not follow, and no reasonable person could believe that it does. Besides, it just isn't the law.

The evidence in respect to Ms. Manson's actions and conduct is not in substantial dispute. Based on that conduct and those actions, the fact is that the record shows that the employer had ample and abundant reasons to believe that Ms. Manson was insubordinate, that she failed and, in fact, refused to follow obviously legitimate rules of her employer, that she attempted to tell her employer how to run its newspaper and what to publish, and that she gave away its property (property that it had paid her to produce), resulting in its use by a competitor in an article that was very critical (to say the least) of its editorial page editor. That will get you "fired" almost anywhere.

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[6] The court recognizes that Congress had to draw the line somewhere, and chose 40 as the lower limit of the law. However, the court does not believe that, in this day and time, there is really anyone left out there who truly believes that a 40 year old person is "too old" to do anything, at least in a profession such as Ms. Manson's.

A separate order shall be entered concurrently herewith.

Dated: March 9, 1999.

/s/_____
H. Franklin Waters
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PATRICIA MANSON PLAINTIFF

VS. CIVIL NO. LR-C-97-560

LITTLE ROCK NEWSPAPERS, INC. D/B/A ARKANSAS DEMOCRAT-GAZETTE DEFENDANT

JUDGMENT
ORDER

FILED MARCH 9, 1999

On this 9th day of March, 1999, upon consideration of the defendant's motion for summary judgment, the court finds for the reasons set forth in a

memorandum opinion filed of even date that the said motion should be and hereby is granted. This case is hereby dismissed with prejudice.

It is so ordered.

/s/_____
H. Franklin Waters
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 99-1943

Patricia Manson, Appellant	*
	*Appeal from the
	*United States District
	*Court for the Eastern
	*District of Arkansas
v.	*
	*
Little Rock Newspapers,	*
Inc. doing business as	*
Arkansas Democrat-	*
Gazette, Appellee	*

Submitted: January 12, 2000
Filed: January 26, 2000

Before BOWMAN, FLOYD R GIBSON and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

Plaintiff Patricia Manson sued her former employer, Little Rock Newspapers, Inc., asserting claims for age and sex discrimination under federal law as well as claims for wrongful discharge and for outrage under Arkansas law. The District Court[1] dismissed the claim for outrage under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Later, the same court granted summary judgment for the defendant on Manson's federal claims and on the remaining state-law claim. Manson appeals from the court's summary-judgment order.[2]

For reversal, Manson argues that summary judgment was inappropriate because there remained genuine issues of material fact on all of her claims. We disagree. Having carefully considered the briefs of the parties and the record on which the District Court granted summary judgment for the defendant, we are satisfied that the grant of summary judgment was proper and must be sustained. Manson has failed

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[1] The Honorable H. FRANKLIN WATERS, United States District Judge for the Western District of Arkansas, who presided by designation over this case filed in the Eastern District of Arkansas.

[2] Manson has not appealed the dismissal of her state-law claim for outrage.

to adduce evidence from which a reasonable trier of fact could find that she was discharged on account of her age or sex. In particular, she has not made any showing that the defendant's stated reasons for discharging her were pretext for unlawful discrimination. As to her wrongful discharge claim, Manson was an at-will employee. As such, she could be discharged without any reason or for any reason at all except in violation of a well-established public policy. Although Manson has argued that she was discharged for exercising her First Amendment rights to free speech and free association, the facts do not support her arguments. Simply put, the defendant is a private entity, not a governmental entity, and thus is legally incapable of violating anyone's First Amendment rights. Any First Amendment rights germane to this case are those of the defendant and its newspaper, not those of Manson, a reporter employed in service of the newspaper.

The District Court, at the end of its thorough and well-reasoned twenty-five page opinion, summed up the case as follows:

> The evidence in respect to Ms. Manson's actions and conduct is not in substantial dispute. Based on that conduct and those actions, the fact is that the record shows that the employer had ample and abundant reasons to believe that Ms. Manson was insubordinate, that she failed and, in fact, refused to follow obviously legitimate rules of her

> employer, that she attempted to tell her employer how to run its newspaper and what to publish, and that she gave away its property (property that it had paid her to produce), resulting in its use by a competitor in an article that was very critical (to say the least) of its [her employer's] editorial page editor. That will get you "fired" almost anywhere.

We agree.

The order of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 99-1943 EALR

Patricia Manson, Appellant *

*Appeal from the

	*United States District
	*Court for the Eastern
	*District of Arkansas
v.	*
	*
Little Rock Newspapers,	*
Inc. doing business as	*
Arkansas Democrat-	*
Gazette, Appellee	*

The petition for rehearing filed by the appellant has been considered by the court and is denied.

March 15, 2000

Order entered at the direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

May 23, 2000

Mr. George B. Collins
One North LaSalle Street
Suite 2235
Chicago, IL 60602

Re: Patricia Manson
v. Little Rock Newspapers, Inc., dba
Arkansas Democrat-Gazette
Application No. 99A939

Dear Mr. Collins:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on May 23, 2000, extended the time to and including July 13, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK

By: /s/ Loretta S. Ruffin
Assistant Clerk

APPENDIX H

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

APPENDIX I

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

APPENDIX J

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such

individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such

individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular

business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during

such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the

subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m).

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.